IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 204, AFL-CIO and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,

*Petitioners,*

v.

LUNDY PACKING COMPANY, *et al.*,

*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The court of appeals in the instant case refused to enforce a bargaining order issued by the National Labor Relations Board on the ground that the bargaining unit set by the NLRB is not an appropriate unit by reason of the exclusion of employees in certain defined job categories. Those employees, however, had been permitted to vote "challenged ballots" in the representation election. And, when the NLRB, following the issuance of the court of appeals' mandate, proceeded to conclude the representation proceeding by counting the challenged ballots of the very employees whom that court had ruled should be included in the unit, the court below entered two orders barring the Board from doing so. The question presented is:

Did the court of appeals, by assuming conrtol over the conduct of an NLRB representation election through orders prohibiting the Board from counting the ballots, so exceed the scope of its reviewing authority and of its jurisdiction over unfair labor practice cases as to warrant summary reversal by this Court? *

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* The National Labor Relations Board was the petitioner in the court below and is a respondent herein.

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United Food and Commercial Workers, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to enable the Court to review the decision and judgment—including two supplemental orders thereto—entered by the Court of Appeals in *NLRB v. Lundy Packing Co.* and *In re Lundy Packing Co.*, 4th Cir., Nos. 95-1364 & 96-1177.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *NLRB v. Lundy Packing Co.*, 4th Cir. No. 95-1364, is officially reported at 68 F.3d 1577

and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-11a. Subsequent to issuing its opinion, the Court of Appeals issued two orders jointly in that case and in *In re Lundy Packing Co.*, No. 96-1177; those orders are unreported and are reprinted at Pet. App. 22a-28a.

The opinion of the National Labor Relations Board which gave rise to this proceeding is not officially reported and is reprinted at Pet. App. 29a-36a. Subsequent to the issuance of the Court of Appeals decision, the NLRB and its Regional Director entered two orders relevant here; those orders are not officially reported and are reprinted at Pet. App. 14a-21a.

## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit in No. 95-1364 was entered on November 3, 1995. A timely petition for rehearing and suggestion for rehearing en banc was denied on January 2, 1996. Pet. App. 12a. On March 25, 1996, the Chief Justice extended the time for filing the petition for a writ of certiorari to and including May 1, 1996. Pet. App. 53a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein are reprinted as a statutory appendix at pp. SA-1 to SA-5 *infra*.

## STATEMENT OF THE CASE

On March 23, 1993, petitioners United Food and Commercial Workers, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO (collectively referred to as "the Union"), filed a representation petition with the National Labor Relations Board ("NLRB" or "the Board"), pursuant to § 9 of the National Labor Relations Act, as amended, 29 U.S.C.



§ 159(c) ("NLRA" or "the Act"). That petition—which covered the production and maintenance employees at the Clinton, North Carolina plant of respondent Lundy Packing Co. ("Lundy" or "the Company")—gave rise to a representation case ("the R case") before the National Labor Relations Board ("NLRB" or "the Board").

In that case, Lundy maintained that the production and maintenance unit proposed by the Union is not "an appropriate unit" within the meaning of NLRA § 9, and that the only appropriate unit is a "wall-to-wall" unit which also includes *inter alia*, clerical employees, hog buyers, quality control employees and industrial engineers. After conducting an evidentiary hearing, the NLRB Regional Director concluded that the unit proposed by the Union, with certain additions, is an appropriate unit, and the Regional Director scheduled a representation election to allow the employees in that unit to vote as to whether the employees wished to be represented by the Union.

Lundy petitioned the NLRB for interlocutory review of the Regional Director's decision in the R case and for a stay of the election. The Board declined the request but, recognizing that a "substantial issue" had been raised with respect to the exclusion of certain positions, the Board directed that employees in those positions be permitted to vote "challenged ballots" which would be segregated and sealed, to be counted only if the Regional Director's decision were reversed. Pet. App. 51a-52a. That is the Board's standard operating procedure in cases of this type. *See* NLRB Casehandling Manual, Part II, §§ 11338, 11344.

On June 3, 1993, the representation election was held and a majority of those in the unit, as determined by the Regional Director, voted for the Union. On appeal of the election to the NLRB, the NLRB sustained the determination that the unit in which the election was conducted is an appropriate unit, and the Union was certified in the

R case as the bargaining representative of the unit. Pet. App. 37a-50a.[1]

Following the NLRB's certification, Lundy refused to recognize and bargain with the Union. The Union thereupon filed an unfair labor practice charge, pursuant to § 10 of the Act, alleging that the Company had breached its duty to bargain collectively under NLRA § 8(a)(5). That charge gave rise to an unfair labor practice case (known in NLRB parlance as a "complaint" or "C case").

In the C case, Lundy admitted the refusal to bargain but on several grounds challenged the Union's certification in the R case, including the ground that the unit, as determined by the NLRB in the R case, is an inappropriate unit. On the basis of its earlier decision in the R case, the NLRB adjudged the Company guilty of an unfair labor practice and entered an order in the C case directing the Company to bargain with the Union. Pet. App. 29a-36a.

To obtain enforcement of its bargaining order, the NLRB filed a petition in the United States Court of Appeals for the Fourth Circuit; the Union intervened in that proceeding. Lundy again defended "principal[ly on the] basis [of] . . . its contention that the Board improperly excluded certain quality control employees from [the] production and maintenance bargaining unit." Pet. App. 1a-2a. The court of appeals agreed with the Company with respect to both the quality control employees and industrial engineers, finding that "[g]iven the community of interests between the included and excluded employees

[1] In considering challenges and objections to the election, the then-Regional Director reversed the original unit determination of his predecessor and directed, *inter alia*, that the ballots of the quality control employees and industrial engineers be counted. The Union appealed this ruling to the NLRB which reversed, sustaining the original Regional Director's decision with respect to these employees. (The Board's opinion in the R case is reported at 314 NLRB 1042; for the Court's convenience it is reprinted at Pet. App. 37a-50a.)



here, it is impossible to escape the conclusion that the [excluded employees] were excluded 'in large part because the [Union] do[es] not seek to represent them.'" Pet. App. 7a. That, the court below stated, is "a classic §9(c)(5) violation." *Id.*[2]

In a two-sentence conclusion to its opinion, the court stated:

> We do not reach [Lundy's] other assignments of error. For the foregoing reasons, we deny enforcement of the Board's order.
>
> ENFORCEMENT DENIED. [Pet. App. 11a.][3]

After reviewing the court of appeals' opinion, the NLRB determined to "accept[] the Court's denial of enforcement" (rather than petition for certiorari), Pet. App. 16a, and to proceed to count the challenged ballots of the quality control employees and industrial engineers in order to determine the majority sentiment in the unit which the court below deemed to be the appropriate unit. Towards that end, the NLRB "remanded" the R case to the Regional Director to "dispose of the challenged ballots in Case 12-RC-7606." Pet. App. 18a.[4] On Feb-

[2] NLRA § 9(c)(5) provides in part that, "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."

[3] The Union filed a petition for rehearing and suggestion for rehearing *en banc*. That petition was denied by the court of appeals on January 2, 1996. Pet. App. 12a. On January 10, 1986, the court below issued its mandate, stating that "The judgment of this Court dated 11/3/95 takes effect today." Pet. App. 13a.

[4] The order quoted in text was entered by the NLRB on February 9, 1996. Three days earlier, the Board had entered an order remanding the C case to the Regional Director for the purpose of counting the ballot. Pet. App. 14a-15a. Lundy filed with the Board a motion for a stay of that earlier order, arguing that, by virtue of the court of appeals' decision, the Board no longer had jurisdiction over the C case. In its February 9th order the Board stated that it had intended to remand only the R case, and that the refer-

ruary 9, 1996 the Regional Director entered an order directing that the challenged ballots be opened and counted, in the presence of the parties, on February 16, 1996. Pet. App. 19a-21a.

To prevent the ballots from being counted and a determination made as to the desire of the employees in the appropriate unit for representation, Lundy filed with the court of appeals a motion to stay the Board's order; a motion to show cause why the Board should not be held in contempt; and a petition for a writ of mandamus, all premised on the theory that the NLRB was not permitted to count the challenged ballots of the very employees whom the court of appeals ruled should have been included in the unit.

In a three-page order entered on February 15, 1996—the day before the ballots were due to be counted—the court of appeals once again sided with the Company. The court below stated that because it had denied enforcement of the bargaining order entered in the unfair labor practice proceeding, "the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction." Pet. App. 24a. That court added: "We reiterate our earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects." *Id.*[5]

In the wake of the court of appeals order, the Regional Director "postponed indefinitely" the counting of the chal-

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ence to the C case in the February 6th order was "inadvertent." Pet. App. 11a. The Board then entered the corrected order which is quoted in text. *See* Pet. App. 16a-18a.

[5] The court of appeals did not issue an injunction or a writ of mandamus out of "[o]ur respect for the Board." Pet. App. 24a. (The court below did docket the petition for a writ of mandamus as a separate proceeding and its order was entered jointly in that case (*In re Lundy Packing Co.*, No. 96-1177), and in the NLRB's original enforcement action (*NLRB v. Lundy Packing Co.*, No. 95-1364).)



lenged ballots, and the NLRB filed with that court a motion for reconsideration of its February 15th order. On March 25, 1996, the court of appeals denied that motion, again asserting that the Board, by proceeding in the R case—which was not before that, or any other, court—to count the ballots of the employees whom the court below had determined had been improperly excluded from the unit, somehow had "acted in clear contravention of its jurisdictional limits and sought to bypass" the court of appeals. Pet. App. 27a. The court below added:

> The court reiterates its respect for the Board's role in the area of national labor relations law. The court expects in turn respect for its process and its mandates. [*Id.* 28a]

## REASONS FOR GRANTING THE WRIT

This Court, we know, is not a court of errors and appeals. But there are rare occasions—involving a court of appeals that strays far outside its authorized jurisdiction and does so in plain disregard of the applicable federal statute and this Court's decisions—that *do* warrant the exercise of the Court's supervisory jurisdiction in a summary manner that both vindicates the law and safeguards the Court's ability to meet its other responsibilities.

*South Prairie Const. v. Operating Engineers*, 425 U.S. 800 (1976), was such a case arising out of the National Labor Relations Act. The point of this petition is to show that this case, like *South Prairie*, merits both the grant of a writ *and* a summary reversal of the decision below.

Very simply stated, the court of appeals ran over the clearly-established limits on the judicial review of administrative agency actions—limits which rest on basic separation-of-powers principles—and did so to gain entrance into an enclave the Congress has sealed against direct judicial intrusion: the conduct of National Labor Relations Board representation proceedings. This form of

judicial overreaching poses a direct threat to a central tenet of the federal system for maintaining industrial peace—that the administration of the representation election process should be centralized in the NLRB. As such the court of appeals' error warrants swift and certain correction.

A. In his opinion for the Court in *Federal Comm'n v. Broadcasting Co.*, 309 U.S. 134, 141 (1940), Justice Frankfurter essayed the definitive statement of the difference in principle between the review by the courts of administrative agency action and the review by a higher court of a lower court decision. In administrative agency cases

> What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. [309 U.S. at 141]

Thus, while the courts are empowered to "correct errors of law" by an administrative agency, *id.* at 145, "that authority is not power to exercise an essentially administrative function," *FPC v. Idaho Power Co.*, 344 U.S. 17, 21 (1952).

That being so, in an administrative agency case, once a reviewing court has "laid bare [an] error" and has "compell[ed] obedience to its correction," the court has "exhausted the only power which Congress gave it." *Broadcasting Co.*, 309 U.S. at 145. "*[A]n administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.*" *Id.* (emphasis added).

This rule of law has full application to judicial review proceedings coming out of the National Labor Relations



Board. For example, in *South Prairie Constr. v. Operating Engineers, supra,* this Court—in a *per curiam* opinion issued on the *certiorari* papers—overturned a court of appeals opinion because the appellate court had exceeded its authority as set out in *Broadcasting Co.* There, the NLRB had held that two wholly-owned subsidiaries of a single parent were separate employers. The D.C. Circuit reversed that NLRB determination and that court proceeded to *require* the Board to treat a combined unit of the employees of the two subsidiaries as an appropriate unit. This Court, after affirming the lower court on the single employer issue, held that the D.C. Circuit, in proceeding to reach out and decide the appropriate unit issue, had "invaded the statutory province of the Board." 425 U.S. at 803. Quoting from *Broadcast Co.*, the *South Prairie* Court stated: "the function of the Court of Appeals ended when the Board's error on the 'employer' issue was 'laid bare.'" *Id.* at 805-06. *See also NLRB v. Food Store Employees,* 417 U.S. 1, 9 (1974).

B. There can be no doubt that the court of appeals here similarly overstepped the limits of its judicial authority to review administrative actions. That court's office was to decide a legal question going to the appropriateness of the unit as determined by the Board. Once that issue was decided—through a determination that the NLRB, in delimiting the appropriate unit here, had erred in excluding certain job categories—the court of appeal's power was "exhausted." At that point, it was for the NLRB—the administrative agency charged by the Congress with administering the Act—to determine (subject, of course, to eventual judicial review) how, consistent with the lower court's decision, to best "enforc[e] the legislative policy committed to its charge."

The line of demarcation between that which is the court's and that which is the agency's goes to the very essence here. For the decision below opened a range of options for furthering the policies of the Act, including

counting the challenged ballots of the employees whom the court of appeals found had been improperly excluded; conducting a new election; or dismissing the representation proceeding and awaiting a new petition. In taking it upon itself to decide, *ab initio,* the soundest of those implementing approaches, the court below assumed a power of administrative determination the Congress has not granted to the judiciary.

C. To be sure, the court of appeals justified its supplemental orders as appropriate to vindicate its mandate. That justification is doubly flawed.

First, as we have just seen, given the ground of decision below, if the appellate court mandate had, in fact, precluded the NLRB from exercising its judgment in deciding how to proceed in the underlying representation case in order to effectuate the Act in a manner consistent with law, the mandate itself would be *ultra vires.* And, the court of appeals' actions in defense of its mandate stand on no stronger footing than the mandate itself.

Second, in any event, what the Board proposed to do following the court of appeals decision is, on any objective view, *entirely consistent* with the lower court's decision and mandate.[6] That "mandate" was to "deny enforcement of the Board's order," Pet. App. 11a, requiring the Company to bargain in the limited unit the Board had determined to be an appropriate unit.

The NLRB's proceedings following the lower court's decision in no shape, form, or manner sought to compel bargaining in the unit that court had deemed to be inappropriate or otherwise to give any renewed legal force to that unit. To the contrary, *what the Board proposed to do was to enfranchise (by counting the ballots of) the*

[6] That the court of appeals viewed its mandate otherwise is, of course, not conclusive. *See Broadcasting Co.*, 309 U.S. at 141 ("it is not . . . true that a lower court's interpretation of its mandate is controlling").



*very employees whom the court of appeals had determined were wrongfully disenfranchised,* so as to determine whether the majority of employees in the very unit that the court below deemed to be appropriate desired union representation.

If the supplemental ballot count showed majority support for unionization, the Board presumably would have certified the Union as the representative in the *court-decreed bargaining unit.* That new certification, in turn, presumably would have supported a new Union request for recognition and bargaining. Faced with such a request, the Company would have been free either to accede to the request and thereby accept the certification as lawful and proper or reject the request to generate a new test of the lawfulness of the new certification. Thus, the Board's proposed action did not—as it could not—revive either the bargaining unit which the court of appeals had determined was an inappropriate unit or the unfair labor practice complaint which the lower court had determined failed to make out a violation of the Act.

Nor is there any merit to the suggestion below that, if the NLRB deemed it appropriate to count the challenged ballots, it was incumbent upon the Board to have requested permission to do so through "a timely request for a remand." Pet. App. 27a. Such permission would be required only if the court of appeals' decision on the question of law that was presented to it "impliedly foreclose[s] the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." As *Broadcasting Co.* teaches, that is emphatically not the law.[7]

[7] The court of appeals' explanation for why a "request for a remand" is required reveals the depth of its misunderstanding of its role. That court stated: "When the Board makes a timely request for a remand to count disputed ballots, it enables *the court to inquire* in an orderly fashion into such relevant issues as the employee turnover that occurred at Lundy during the Board's delay." Pet. App. 27a (emphasis added). The very point of *Broad-*

Finally, the court of appeals was mistaken in its belief that the judicial function should be expanded in order to avoid "endless rounds of piecemeal litigation." Pet. App. 24a. *Broadcasting Co.* exposes the error in that approach:

> It is . . . urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." [309 U.S. at 146]

D. What we have just shown establishes that, under settled principles of administrative law, the court of appeals exceeded the scope of its judicial review authority. But there is more: in so doing, that court exceeded its

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*casting Co.* and its progeny is that it is for the administrative agency—and *not* for the court—to decide in the first instance such policy questions as whether the passage of time makes it inappropriate to make decisions based upon challenged ballots.

Only if the Board were to determine, after counting the challenged ballots, to issue a certification of the Union as the bargaining representative and if that certification were to eventuate in a bargaining order which the Board sought to enforce would it then be appropriate for the court of appeals to determine whether the "delay" made enforcement inappropriate. That was the situation in *NLRB v. Long Island College Hospital*, 20 F.3d 76 (2d Cir. 1994), the case on which the Fourth Circuit relied. In *Long Island College Hospital* the NLRB had issued a certification and then, fourteen years later, the Board issued a bargaining order based upon that certification; when the NLRB petitioned to enforce its bargaining order, the court of appeals undertook to determine whether the extraordinary delay in that case made enforcement inappropriate.



*jurisdiction* under the particular NLRA provisions that govern here.

As we noted in stating the case, the NLRA provides for two separate types of legal proceedings: representation proceedings under § 9 ("R cases"), and unfair labor practice proceedings under § 10 ("C cases"). Final orders entered by the NLRB in the latter type of cases are expressly made reviewable in the courts of appeals by NLRA § 10(e) & (f). But § 9, "which is complete in itself, makes no provision, in terms, for review of a certification by the Board." *A.F. of L. v. Labor Board*, 308 U.S. 401, 406 (1940).[8]

From the very first days of the Act, this Court has recognized that the "statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices." *A.F. of L.*, 308 U.S. at 409. Given that language, and what the "legislative history confirms," the "conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts." *Id.* at 409, 411.

Of course, where, as here, "an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit . . . the Act makes full provision for judicial review of the underlying certification" through review of the order in the unfair labor practice proceeding growing out of an NLRA § 8(a)(5) refusal-to-bargain complaint. *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964).

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[8] Rather than providing for direct review of certifications in R cases, NLRA § 9(d) provides that if, and only if, an order in an unfair labor practice case "is based in whole or in part upon facts certified" in a representation proceeding, the record of that proceeding "shall be included" in the record of the unfair labor practice case.

But a reviewing court's jurisdiction over the unfair labor practice proceeding does not generate any direct judicial authority over the conduct of the R case. That is the clear teaching of *Labor Board v. Falk Corp.*, 308 U.S. 453 (1940), which was decided along with *A.F. of L. v. Labor Board*.

In *Falk*, the NLRB had consolidated an unfair labor practice charge alleging that the employer in that case had "fostered and dominated a company union called the Independent Union" with a representation petition which a CIO-affiliated union had filed. 308 U.S. at 454. The Board sustained the unfair labor practice charge and ordered the employer to "disestablish" the Independent; the Board also directed an election and provided that the ballot would not include the Independent. On the Board's petition for enforcement pursuant to § 10, the court of appeals enforced the NLRB order in the unfair labor practice case but the court "attached a condition to the Board's order whereby Independent might become a candidate in the proposed election." *Id.* at 457. This Court reversed.

In the Court's view, although the C case and R case had been consolidated, each nonetheless remained a "distinct proceeding." 308 U.S. at 456. The "conditions attached by the court [of appeals] to the Board's order operated as a modification" of the direction of election in the R case proceeding. *Id.* at 458. That being so, the court of appeals exceeded its authority in imposing that condition since § 9 "vests power in the Board, not in the court, to select the method of determining what union, if any, employees desire as a bargaining agent," *id.*, and an appellate court "has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted," *id.* at 459.

*Falk* is directly on point. As *Falk* makes clear, the unfair labor practice case and the representation case here were "distinct proceeding[s]." The court of appeals had



jurisdiction over the former, which provided the basis for reviewing determinations made in the R case *insofar as those determinations formed the predicate for the bargaining order in the unfair labor practice case*. But the appellate court's jurisdiction over the unfair labor practice case did not empower it to "select the method of determining what union, if any, employees desire." By precluding the NLRB from concluding the R case proceeding by counting the ballots of the very Lundy employees whom the court below held should have been included in the unit, the court of appeals exceeded its authority under the Act.[9]

E. One final point needs to be made. Although the target of the court of appeals' wrath was the National Labor Relations Board, the ultimate victims of that court's orders are the employees of Lundy and their right of self-determination protected by NLRA §§ 7 & 9. In its misguided attempt to censure the NLRB for having the temerity to proceed with the Board's own representation processes without first obtaining the court's leave, the Fourth Circuit has deprived the Lundy employees of their first right under the NLRA: the right to determine for themselves, through a secret ballot election, whether

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[9] The instant case is thus entirely different from *Service Employees Local 250 v. NLRB*, 640 F.2d 1042 (9th Cir. 1981) and *W.I. Miller Co. v. NLRB*, 988 F.2d 834 (8th Cir. 1993), on which the court of appeals relied. Both of those cases involved a single unfair labor practice case which was appealed to and decided by an appellate court; the question in both cases was whether, following the conclusion of the appellate court proceedings, the NLRB was free to adjudicate unfair labor practice claims that could have been but were not previously adjudicated (*Service Employees Local 250*) or to provide additional remedies for the unfair labor practices that the Board had found (*W.I. Miller Co.*). In each case, the court of appeals held that further NLRB proceedings in the unfair labor practice case were improper. In neither case, did the court of appeals claim to use its authority over an unfair labor practice case to control the NLRB's conduct of a distinct representation case.

they wish to deal with their employer through a collective representative.

That makes it all the more appropriate for this Court to undo what the Fourth Circuit has done, to set that court straight as to the scope of its authority, and to restore to the NLRB its authority to proceed with the representation case here in a manner consistent with the appropriate unit law as announced by the court of appeals.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the orders of the court of appeals precluding the Board from conducting further proceedings in the representation case should be reversed.

Respectfully submitted,

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# APPENDIX

## STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*, provides in pertinent part as follows:

**Section 8, 29 U.S.C. § 158. Unfair Labor practices**

(a) It shall be an unfair labor practice for an employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [15]9(a) of this title.

* * * *

**Section 9, 29 U.S.C. § 159. Representatives and elections**

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof: . . .

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); * * *

* * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c), is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and



the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * *

**Section 10, 29 U.S.C. § 160. Prevention of unfair labor practices**

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(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

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(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file



its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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